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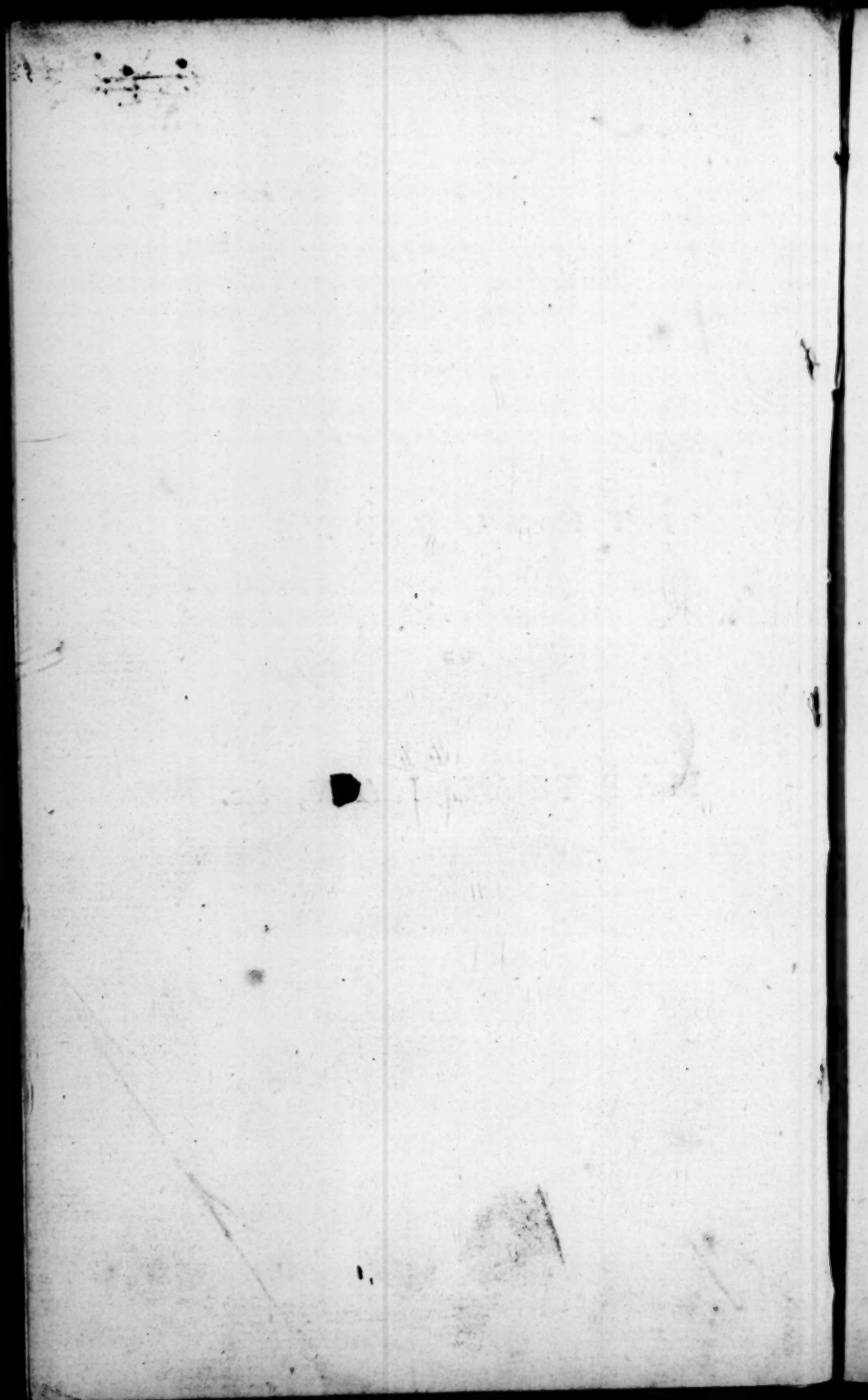
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T H O U G H T S

ON

MARTIAL LAW, &c.



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THOUGHTS 6
ON
MARTIAL LAW,
WITH A
MODE RECOMMENDED FOR CONDUCTING
THE
PROCEEDINGS
OF
GENERAL COURTS MARTIAL:

INSCRIBED TO THE
GENTLEMEN OF THE ARMY,

BY
RICHARD JOSEPH SULIVAN, Esq. K

SANCTIO JUSTA, JUBENS HONESTA, ET PROHIBENS CONTRARIA.
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P R E F A C E.

AMONGST the Gentlemen of the Army, for whom alone this Treatise hath been compiled, many unquestionably will be found, who from experience and ability, are beyond the reach of any information which the Author can give them, either in their executive or deliberative capacities. To them, therefore, little need be said: Their candour will, unsolicited, teach them to look with indulgence on a performance calculated for the meridian of a Military sphere; and their good sense, to protect it, should it be deemed not unworthy of their patronage. The young

and inexperienced, however, are those for whom these hints are principally designed. They, from the novelty of the scene, recently perhaps appointed either in the Regulars or Militia, cannot intuitively possess a knowledge of the duties of their profession. To aid the disposition of doing well, the rule must be prescribed; for justice may be intended, though injury may result, from an ignorance of the principles on which a man professionally should act.

Were it in the inclination of the Author, the few following pages might readily be swelled into a volume of a respectable appearance. The materials are abundantly numerous for it, and the attempt would most probably be received with a degree of approbation by the public in general. But men in the field
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are not to be amused with argumentative discussions:—Quick in their decisions, they stand in need of general principles, more than of a variety of cases. In this idea, these thoughts were with difficulty drawn into their present compass.

The assistance received from Mr. S. P. Adye's Treatise on Martial Law, hath not been inconsiderable. The references made by that Gentleman to some of the authorities who have treated on the subject, and which clearly led the way to an useful source of information, exempted the Author from many a laborious and unpleasant investigation of statutes, pleas of the Crown, &c. Had Mr. Adye, indeed, been more particular with respect to the *proceedings* of General Courts Martial, the present work would never have
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been obtruded on the world. But as he is silent on points which may every day occur, and which have frequently perplexed the decisions of a court,—and as the officers of the army have invariably expressed a desire to be informed decisively of the grounds on which they stand, an attempt to ascertain them, may not be unwelcome or ill-timed. In short, if in a matter of such high importance, in which are most deeply concerned the interests both of justice and humanity, one unpresuming effort shall be found to tend towards the safety and well-being of even the lowest veteran of the camp,—every purpose of the Author will be fulfilled.

THOUGHTS

T H O U G H T S
O N
M A R T I A L L A W, &c.

IN a country, famed throughout the world for the wisdom of its laws, the excellency of its civil and criminal jurisprudence, and the jealous attention of its members to the smallest innovation of the liberty of the subject, it is a matter of singular consideration, that so little hath been written on the Martial Law of England. That this may have proceeded from its dryness and sterility will be readily allowed. A science, without professors, must inevitably fall into disreputation; besides
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which, the discipline of a camp, in every essential, most widely different from that of a common court of law, may have made it unworthy of the attention of those whose abilities would have enabled them to have expatiated on the subject. In the one, indeed, where established formality presides, the crime* which the law punishes, as well as the penalty which it inflicts, is ascertained and notorious, nothing being left to arbitrary discretion. The king, by his judges, dispenses, what the law has previously ordained, but is not himself the legislator. Whereas in the other, the judge both ascertains the guilt and inflicts the punishment at his discretion.

Martial Law, in general hath been defined, a temporary excrescence, bred out of the distemper of the state, and not as any part of the permanent and perpetual laws of the kingdom. Sir Matthew Hale,

* Blackstone, Vol. I. page 415.

and Sir William Blackstone, say, it is built upon no settled principles, but is entirely arbitrary in its decisions, and is, in truth and reality, no law, but something indulged rather than allowed as law. However this may be—the Law Martial of England is indisputably authorized by an act of the legislature. The king is empowered to form, make, and establish articles of war, both for his own troops, and for those of the East India Company. He is likewise empowered to grant a commission or warrant under his royal sign manual to the directors of the East India Company, who, by virtue of such warrant or commission, can delegate their authority to their presidencies abroad; and this act, it is ordained, shall continue in full force for one year, and ~~and~~ then be subject to revision and further prolongation.

When we consider therefore, in times of war, when this act is calculated with

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efficiency to operate, that no less perhaps than a million of subjects, either in arms for their sovereign, or as retainers to his camps, are amenable to its coercion ; and that the power of the crown, an unlimited power to create * crimes, and antient punishments to them, not extending to life or limb (for the life and limbs of a man are of such high value in the estimation of the law of England, that it pardons even homicide, if committed *se defendendo*, in order to preserve them) is not unalienably confined to the sovereign himself, but is diffused, by delegation, to his different officers on service ; it will not be deemed a reflection, hazarded without some foundation, to say, that those whose more immediate province it has been, to digest a code, and throughout the forces, to establish an uniformity of law procedure, have been negligent in the service of their country.

* Blackstone.

The study of the law hath been deemed more than a sufficiency of employment for the life of any one man. If, therefore, the intricacies of that wily labyrinth can occupy the time of a person, entirely devoted to its service, where shall we suppose those in a military line are to be found, who, in the bustle of the field, are to dedicate their time to a tedious, and to them, an unprofitable labour? Processes and retainers out of the case, even chancery itself would lose its reputation. No man works in these days, but, in the prospect, or in the certainty of reward. The soldier, therefore, who spends his days in toil, and his nights in hardship and fatigue, cannot be supposed to have the means, or the disposition of qualifying himself for a court of law; or for that most serious and important of all his duties, the passing of judgment on his fellow creatures.

Impressed in a high degree with the purest and most tenacious principles of honour, and regulating their conduct by dictates of equity, more than those of stubborn ordination, officers may be supposed to be the most unexceptionable judges; but, in truth, the more benevolent and praise worthy they are, in the effusions of the finer dispositions of the soul, the more liable they are to err. Rigour in such minds is seldom found exerted. They acquit when in their power, without an adherence to the niceties of prescribed distinction; and clemency in consequence, frequently not only misses the beneficence of its intentions, but oftentimes proves the groundwork of subsequent severity.

To obviate these inconveniencies, a Judge Advocate is appointed, whose province it is to know the law*. But, on

* Articles of War, sect. 15. art. 6.

actual service, how seldom are lawyers to be met with? A Subaltern, therefore, is usually employed in that department. If, then, officers of long experience and ability, cannot be supposed to have had opportunities sufficient to have cultivated their talents in a field so destitute of laurel, how much less so can it be expected in those whose years and understandings may not have arrived at their period of maturity? For can we say now it is, as it was among the Romans, when the very children were obliged to learn the twelve tables by heart, as a *carmen necessarium*, or indispensable lesson? That law, with all its dire concomitants, would be pernicious in a camp, we most readily will subscribe to. Brevity is essentially necessary on service. But at the same time that we concur in the banishment of all the subtleties of the law, we must as readily confess, that a general knowledge of its principles should be encouraged, lest

those should prove unequal to the task, who may be placed upon the judgment seat of mercy.

Under a conviction of the propriety of this opinion, and of that sound and long sanctified juridical axiom, that law without equity, though hard and disagreeable, is much more desirable for the public good, than equity without law—the following thoughts have been thrown together. Unskilled in the deeper researches of the science of the law, all abstruse reasoning hath been avoided. The authorities, however, from whence each article hath been selected, have been carefully marked down. The very words of some are given, nor are there any points omitted, as far as we can judge, and as far as the extent of this little essay is meant to reach, which can in any wise tend to elucidate the subject. The decision of the candid
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will determine how far these purposes have been answered,

The King, as we have already said, being empowered by act of parliament, (that express investiture, which by the consent of the whole community, placed in his hand the sword of justice) to establish certain regulations for the better disciplining of the army, hath, in the articles of war before-mentioned, enumerated all such crimes as are punishable with *death*, and in general all such as are cognizable by a Court Martial, when acting within the reach of the civil power. Many commentators on the laws, however, have given it as their opinion, that, besides those enumerated in the articles of war, *Aliens* †, who in a hostile manner invade the kingdom, and who in company with rebels of the country or otherwise, are seized and

† Hale's, P. 4. C. 10. : 5. 3. Coke's Inst. 2.

deemed

deemed worthy of punishment, cannot be dealt with as traitors, but must be turned over to the authority of the Martial Law. But here let it not be forgotten, that in time of war, or rebellion, a man may be justified in doing many treasonable acts by compulsion of the enemy or rebels, which would admit of no excuse in times of peace. 1 Hale, P. C. 50. For as punishments are only inflicted for the abuse of that free will which God has given to man, it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and necessity. This then understood, the articles of war in general are explicit with respect to such misdemeanors as can be tried under the sanction of the military act. Yet as unusual, and unprovided for circumstances may occur, it is always to be remembered, that the concurrence of the *will*, when it has its choice either to do, or to

to avoid the fact in question, is the only thing that renders human actions praiseworthy or culpable. Indeed to make a complete crime cognizable by human laws, there must be both a *will* and an *act*. Sir Matthew Hale's words on the subject should be rivetted in every soldier's breast. It is the greatest offence, says that able lawyer, for a soldier to kill, or so much as assault his General. Suppose then the inferior officer sets his watch or centinels, and the General, to try the vigilance or courage of his centinels, comes upon them in the night, in the posture of an enemy, as some commanders have too rashly done, if the centinel *strikes* or *shoots* him, taking him to be an enemy, his *ignorance* of the person *excuses* his *offence*.

The power thus existing in the Sovereign, and, by appointment, in his delegates, to direct Courts Martial to be held, and a general Court Martial being
required,

required, the person thus exercising the power, issues a warrant to some officer, as the president, and to other officers, as the members of the court, which he finds it necessary to appoint. And the more effectually to prevent the evil consequences which might result from the absence of any of the members who shall thus have been appointed, it is provided for and ordained that, no officer, or soldier, while in orders as a member of a Court Martial, shall * be ordered on any other duty; nor is the court permitted, to sit longer at a time than from eight o'clock in the morning till three in the afternoon, excepting in such cases as require an immediate and rigorous example.

The General Court Martial being thus in orders to assemble, and the witnesses

* Articles of War.

for

for and against the impending prosecutions, being summoned to attend, the court forms itself at the appointed place, agreeably to its commission, and in the manner following: The members being duly seated—the President at the head, and the other members, according to their several ranks and standings in the army, the Judge Advocate calls over their names one by one, beginning with the President; and then having received from the President his warrant, he reads aloud the President's appointment, and afterwards the commission by which he officiates as Judge Advocate himself. This being done, and the prisoner to be tried being brought before the court (he having been previously furnished with a copy of his accusation, and informed by the Judge Advocate of the time and place allotted for his trial) the Judge Advocate, who acts in the double capacity of Recorder to the court and counsel for the king, demands, *If he has exceptions to*
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any of the members present. If he has not, the Judge Advocate swears in the court, and proceeds to the trial; but if he has, the exceptions which he pleads are to be deliberated upon by the court, and admitted (if they are found of consequence sufficient) by the substitution of new members in the room of those so excepted against. No member, however, can be excepted against after the formation of the court, neither can an ignorance of his former character be pleaded against him, unless he shall have perpetrated some deed, or have been principally or accessarily concerned in the commission of some act, subsequent to such formation, which shall be adduced as guilt against him.

Exceptions, however, being pleaded, it becomes a point of serious investigation to the court, to determine on those which ought to be admitted, and on those

those which ought to be rejected.— Many, but all of them of some consequence, are the exceptions, which a culprit may advance against a juror in a common court of law; and equitably proceeding, it is not more than justice to a prisoner to admit them in the same extent at a military tribunal; (which in all cases where the act is silent, should be supposed to be regulated in a similar manner with other courts of judicature) and the more especially, when it is considered that members of a Court Martial sit not only as *jurors*, but, ultimately, as *judges*. In opposition to this indeed, it has been said, that Lord George Sackville *excepted* against General Belford, but, that his reasons not being sufficient, they were over-ruled by the court. The truth, however, is, that Lord George Sackville did not except against General Belford; he did not offer what he advanced as a legal objection to that officer as a member of the Court Martial; he rather

rather submitted his reasons to the court, and to General Belford himself, for their consideration *. Exceptions, therefore, being allowed, the most material are those which hereafter shall be enumerated. Before we come to that point, however, it may not be unnecessary to remark, that, in a court of law, and in a criminal case, when the Sovereign of the state is necessarily a party, it hath been supposed, though erroneously, that the counsel who prosecuteth in his behalf, hath, in like manner with the prisoner, a right to challenge, and *peremptorily* to declare his exceptions against a juror. On this head, the law is clear. The privilege of peremptory challenges, though granted to the prisoner, is denied to the King by the statute, 33 Edw. I. st. 4. which enacts, "that the King shall challenge no jurors, without assigning a cause certain,

* Sackville's Trial, p. 6.

to be tried and approved by the court." However it is held, that the King need not assign his cause of challenge, 'till all the panel is gone through, and unless there cannot be a full jury without the persons so challenged, and then, and not sooner, the King's counsel must show the cause, otherwise the juror shall be sworn.

In high and petit treason, a prisoner has a right to challenge thirty-five peremptorily, that is without assigning any cause; in murder, and other felonies, twenty; and in both as many as he can show sufficient cause of objection to. But, in inferior offences, cause must be assigned for every challenge. Peremptory exceptions are only allowed when life is in danger, and are then permitted by law, in merciful indulgence to the prisoner, who, to adduce a perfect satisfaction in his mind of the impartiality of the jury, is not suffered to be tried

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even by one whose countenance he shall dislike. As it is in tender commiseration, therefore, of the prisoner's situation, that these kind of challenges are allowed, it is almost unnecessary to remark, that it would counteract the benevolent intention of the law, were they permitted on the part of the prosecution; it would operate powerfully against the life of the prisoner, and undermine that principle of mercy which pervades the whole system of the Criminal Law of England.

But here, unhappily, we are to observe, that one of the disadvantages attending a military life, is the privation of this most satisfactory indulgence. Prisoners who are to be tried for their lives by Courts Martial, cannot be granted this great privilege of challenging without cause. And the reason is irrefragable; for were it permitted on board ship, or in distant garrisons, it would be impossible

ble to bring criminals to punishment, for want of a sufficient number of members to compose a court. And hence it follows, that let what will be the offence, no challenge can be allowed, without a reasonable cause being assigned. Officers, indeed, are not to be told, that relinquishing their seats as members of a Court Martial, when excepted against unsatisfactorily, and when such relinquishment (without inconvenience to the routine of service) is practicable, is not only humane and delicate, but prudent and commendable also. For to fit in judgment, only because objections have been over-ruled, cannot be thoroughly consonant either to honour or humanity : the mind naturally feels, and is stung with the indignity of a challenge, and no character is, or should be, so watchful of its reputation as that of a soldier.

The course of Military Law winding itself in many forms, in the same channel with that of civil and criminal jurisprudence, a *Court of Enquiry*, is conformably to the usage of war, frequently appointed, in like manner with a grand jury, to search into complaints, (with a latitude, indeed, not granted to a grand jury, that of *examining all* witnesses, as well as those on the *part* of the Crown; but which it were well if it were *interdicted*) and finally to determine, whether the persons complained of are punishable by law. Members of a Court † of Enquiry, therefore, are liable to be excepted against as members of a Court Martial, that is, if they shall sit as members on the same cause, (their prior *presentation* being to be considered of the nature of an *indictment*) or if upon the trial of another action, wherein the same ‡ matter is in

† Adye.

‡ 8 Henry 4. 2 pl. 4. Coke upon Littleton, 157. 6. question,

question, it shall happen to be material, though not directly in issue. It is likewise adjudged good cause of challenge on the part of the prisoner, that the juror hath a claim to the forfeiture*, which shall be caused by the party's conviction, or that he hath declared his opinion before-hand† of the party's being guilty, or that he will be hanged, or the like. But a prisoner shall not examine a juror concerning such matter upon hearsay‡, because it sounds in reproach; and it hath been adjudged, if it shall appear that the juror made such declaration from his knowledge§ of the cause, and not out of any ill-will to the party, (though, surely, the declaration appears strongly presumptive of prepossession, and the best founded exception, one

* State Trials, Vol. 1. f. 502.

† 21 Hen. 7. 20 pl. 10. State Trials, Vol. 4. f. 184, 185.

‡ 49 Edward 3. 1 pl. 2.

§ Rolles' Abridgement, 67, Letter 1.

would suppose, that can be adduced) it is no cause of challenge: and it furthermore hath been adjudged no good cause of challenge, that the juror hath found others guilty on the same indictment; for the indictment, in judgment of law, is several against each defendant, and every one must be convicted by particular evidence against himself*.

And yet this seems to be a subtle and unmerciful decision; for where several are involved in the same crime, and one is found guilty, what chance have the others for their lives, if they shall be tried by the same men? In civil suits, where a juror has formerly given a verdict in the same cause, whether between the same parties or others, it is a good cause of challenge (Coke Lit. 157. Cro. Eliz. 33. pl. 13.) *a fortiori*; it would appear a good challenge when a

* Hawkins, P. C. 418.

man is on the trial of his life, which is so infinitely dearer to him than his property. Judges in a court of honour, therefore, will determine on this harsh, if not unequitable solecism, in common ordination,

The law also allows infamy to be a good cause of challenge, particularly if the juror hath been convicted of treason, felony, perjury *, &c.—But these exceptions can seldom happen in a Court Martial; and besides, none of them are principal challenges (though perhaps allowed, on strong presumptive proof) unless the record of their conviction be produced and shown.

A principal challenge is such, when the cause assigned carries with it *prima facie* †, evident marks of suspicion, either of malice or favour; as that a ju-

* Coke upon Littleton, 158.

† Blackstone, Vol. 3. Page 363.

ror is of kin to either party within the ninth degree ; that he has been abitrator on either side ; that he has an interest in the cause ; that there is an action depending between him and the party ; that he has taken money for his verdict ; that he has formerly been a juror in the same cause ; that he is the party's master, servant, counsellor, steward, or attorney ; or of the same society or corporation with him. All these are principal causes of challenge, which, if true, cannot be over-ruled, for jurors must be *, *Omni exceptione majores*.

The above being, in general, the exceptions which ought to be admitted at a General Court Martial, either on the part of the prisoner, or of the sovereign, we shall now proceed to the formation, or what is in common stiled the swearing in of the court. The preamble, as inserted in the Articles of War, being

* Blackstone.

first read to the President by the Judge Advocate, the Judge Advocate administers to him the oath; and then continuing with the members, agreeably to their ranks, and as many at a time as can conveniently be sworn, he afresh reads to them the preamble, and tenders them respectively the oath; and after that, the oath which it is ordered he shall take, is administered to him by the President, and so the tribunal is formed.

Unacquainted with the serious consequence of a strict attention to the *minutiae* of form in criminal proceedings, General Courts Martial have looked upon the first swearing in of the court, as a sufficient authority to warrant their proceeding on the trial of a variety of offences; whereas, in propriety, the court should be sworn afresh at the commencement of every new prosecution: for though, as judges, (in the manner of a court of common law) once swearing would be sufficient;

sufficient; yet, as jurors, who are sworn on every different trial, though identically the same men, so are the members of General Courts Martial to be considered when a new criminal is brought before them. Lest, however, an established, and therefore an undisputed practice, should have acquired a force still difficult to be eradicated, we shall endeavour to point out those reasons which induce us to maintain this opinion. In the oath which is taken by each of the several members of a General Court Martial, the words, *matter* *, and *prisoner*, are cautiously inserted. These words, therefore, being absolutely confined to a single matter, and a single prisoner, and *matters* and *prisoners* not being subjected to their jurisdiction, how is it possible that men, with propriety, can proceed upon a trial which they are not warranted by law to decide upon? Were the obligation in the Articles of War de-

* Articles of War.

cisive as to the trial of all matters, and all persons, and in all cases; or were the court possessed of the authority of extending the meaning of the oath, once swearing would undoubtedly be sufficient; but, as in every respect, the contrary is evident,—as the very words of the oath itself express (words which cannot be altered but by the legislature) that “they shall well and truly try and determine according to their evidence, in the matter before them, between their Sovereign Lord the King’s Majesty, and the prisoner to be tried.”* How can it be otherwise than an unwarrantable irregularity in them, to proceed upon the trial of offenders, who, in the eye of the law, are not amenable to their authority? From whom, even they divert the pure stream of justice and humanity. For if the *first* prisoner to be tried, has a right to challenge an officer,

* Articles of War.

who

who may be appointed to sit on an investigation of his offence, as a member of a Court of Enquiry, or who may be liable to any of the exceptions before enumerated,—why shall not the *second* and *third* prisoner be entitled to the same merciful indulgence?

Led away by the practice of others, men of the best intentions, are often found obstinate in principles, which, without reflection, they have adopted. And in this view may be considered the many instances which have occurred of unwillingness of General Courts Martial to be sworn afresh on a new trial. Were the ceremony long, tedious, or troublesome; or were it to involve any thing extraordinary in its consequences, the opposition which it hath met with might, in some degree, be accounted for; but when it is universally known to be a matter of but momentary interruption, and, at the most, to be only an adherence
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to form, how strange does it appear, that men, instead of the pleasant paths of certainty, should prefer those of perplexity and doubt? In every event, however, and by whatever means the custom may have been established, one thing is certain, that conforming to a rule never can be wrong; and that, therefore, following implicitly the Articles of War, is only complying with the ordinations of that power, which alone hath competency to abrogate or alter laws.—Sir William Blackstone, on the best law authorities, speaks decidedly on this question. “Not only the substantial part, or judicial decision of the law,” says that elegant commentator, “but also the formal part, or method of proceeding, cannot be altered but by Parliament: for if once those outworks were demolished, there would be an inlet to all manner of innovation in the body of the law itself.”

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The Court Martial being regularly formed in the manner we have before-mentioned, and the witnesses in attendance, the Judge Advocate begins upon the prosecution. Prepared with the charge, which must particularize as well *time* and *place*, as *circumstance*, and the prisoner standing before the Court, the Judge Advocate asks him, upon reading to him his crime, *How say you,—are you guilty of the crime laid to your charge, or not?* (the law, even during the time when all other proceedings were in Latin, ordaining that the indictment should be read to a prisoner distinctly in the English tongue, that he might fully understand his charge) For if he should plead guilty, or refuse to plead, as in many instances is the case, the prosecution immediately closes, and judgment is passed accordingly (standing *mute ex visitatione Dei*, alone excepted: that act of God rendering him, from an inability to plead himself, most peculiarly entitled to a solemn

lemn and regular investigation of his conduct) ;—but, on the contrary, if he should throw himself upon the decision of his peers, and consequently stand his trial, by pleading *not guilty*, the witnesses on the part of the Crown, are, *viva voce*, to be examined, and their depositions recorded by the Judge Advocate. And here it should be remarked, that the plea of *not guilty*, should at all times be encouraged in trials at a General Court Martial ; for however conscious a prisoner may be himself of the unjustifiableness of his conduct, there may circumstances appear to mitigate the atrociousness of a crime, and, in some degree, serve to entitle him to mercy.

The oath to be administered to witnesses runs thus :—*You shall true and perfect answer make to all such questions as shall be put to you, touching the matter now before the court, between our Sovereign Lord the King's Majesty, and the prisoner*

to be tried, which shall be the truth, the whole truth, and nothing but the truth, so help you God.—Nor is this oath to be tendered but in the presence of the whole court; and of the prisoner himself, although *deputations*, as they are called, have frequently been sent to examine a witness, who, from illness, hath been unable to attend. It is true, his Majesty annulled the proceedings of one Court Martial, for having appointed six of their members to take the evidence of a valetudinary witness. But still the practice is continued, the deputation is evermore employed, although in fact, its irregularity is at any time sufficient to render the proceedings nugatory, no part being equal to the whole, unless the delegation of its power be warranted by law. To avoid the consequences attendant upon a measure of this kind, therefore, the whole court should adjourn themselves to the house or quarters of the sick person, and there

there, and in the presence of the prisoner, examine and take his deposition.

The pleas of the Crown on this head, are explicit, and show, for instance,—that where a commission issues to A and B, and twelve others, or any two of them, of which A or B shall be one, to take or try indictments, and any of the other twelve proceed without the interposition or presence of either A or B, all proceedings, in such case, trials, convictions, and judgments, shall be void, for want of a proper authority in the commissioners, and may be falsified upon bare inspection, without the trouble of a writ of error: it being a high misdemeanor in the judges so proceeding, and little (if any thing) short of murder in them all, in case the person so attainted be executed, and suffer death.

The prisoner, however, being put upon his trial, the Judge Advocate, as

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prosecutor for the Crown, begins with his proof of the delinquency of the prisoner's conduct. For the issue is said to lie, and proof is always first required upon that side which affirms the matter in question. To this end, he examines, and cross-examines the several witnesses,—calls upon every one who can adduce testimony in favour of the prosecution, and aims in every respect to establish the certainty of guilt. The court likewise, as judges, take part in the prosecution,—they also examine and interrogate, (either collectively or individually, as they think proper) and in concert with the Judge Advocate, endeavour to arrive at a knowledge of the fact. The Judge Advocate, however, should have concluded with the examination of a witness, before the interrogatories of the court are in general propounded. For although such interrogatories may be pertinent and applicable, yet as the several members have, in the end, an opportunity

portunity of drawing forth answers to such questions as they may put, and as an interruption of the Judge Advocate may probably break in upon a chain of leading and necessary information, it were at all times to be wished, (except in particular and complicated cases) that he were suffered to finish with his examination before the introduction of any new matter be admitted by the court. The examination in behalf of the Crown being at an end—the prisoner cross-questions the witness, if he pleases, or defers it till he is put upon his defence: a privilege, indeed, which is allowed him through every stage of the prosecution. But neither he, nor the Judge Advocate, has a right to cross-examine his own witnesses, lest it should lead to answers concerted previous to the trial, for the establishing of innocence on the one hand, or of guilt on the other. The Judge Advocate is permitted to cross-examine the prisoner's witnesses, and the prisoner

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those for the Crown; but neither of them the witnesses produced by themselves.

In the examination of witnesses a custom hath prevailed, which, in all its consequences, seems to affect both the principles of equity and justice. This hath been the indiscriminate admission of persons into court subpoenaed on trials. Officers and men have, by this means, found their way into General Courts Martial, when a witness on the same side hath been labouring under the pressure of a variety of questions: the difficulties which he encountered, have thereby been dexterously avoided. The degenerate amongst them, in the replies which he hath made, have learnt the way of un-deviatingly keeping in the same story; the purposes of cross-examination have consequently been frustrated, and a criminal, perhaps, hath been adjudged to suffer, when contradiction in the evidence

dence might possibly have saved him. No evidence, however, can be given against a prisoner but in his presence, neither can hearsay evidence be admitted.

The examination of the crown witnesses being brought to a conclusion, the prisoner is put upon his defence. If a soldier, he generally commences it without adjournment;—if an officer, a time is usually begged for preparation, and his prayer is granted, if the period is not deemed to be unreasonable. Thus arrived at the most serious and important moment of his trial,—the instant of clearing up his honour, or of sinking under a load of infamy and guilt,—what is there not required to enable him to act with judgment and deliberation? Probably, uninformed of letters, a private centinel, or serjeant!—Possibly a subaltern, as yet in youth, and unacquainted with the strictness of discipline and order!—Unaided, perhaps, by counsel or

by friends ;—left to the wild, unconnected dictates of a bewildered fancy,—how, and in what manner, is he to effect one salutary purpose ?—Unhappy being !—distracted with fear, and sinking under apprehension, whither is he to turn himself, to escape the threatening destruction ?—Fate hangs dreadful o'er his head !—He hears nothing,—he knows nothing !—He implores for mercy,—he submits himself to Heaven, and the equity of his judges. You, therefore, who are ordained to preside over, and decide the destiny of your fellow-creatures, protect him with your counsels,—lead him with a cautious hand through the mazes of his defence,—and as, in the hour of prosecution, you aimed to fix his guilt ; so, in the moment of exculpation, assist him in the vindication of his innocence.

In the course of the prosecution, as hath been already shown, the Judge Advocate

vocate officiates as Counsel for the King, and in the defence, he is allowed to restrain the delinquent from advancing any thing to criminate himself. This, in some cases, may be too circumscribed a power. But, however, as the court themselves have the privilege of trying every means to exculpate the prisoner from guilt, it is less to be regretted that the *Law-Officer* is not declaredly permitted to afford him that assistance which he might stand in need of. Not that indeed it could be of any material service to him, except in those instances when counsel could not be procured; as otherwise, a criminal at a General Court Martial, as well as a criminal in any other court, hath a right to the benefit of advice from those capable of assisting him. When the jury is sworn, (says an eminent lawyer *) if it be a cause of any consequence, the indictment is

* Blackstone, Vol. 4. P. 348.

usually opened, and the evidence marshalled, examined, and enforced by the counsel for the Crown, or prosecution. But it is a settled rule at common law, that no prisoner shall be allowed a counsel upon his trial, upon the general issue, in any capital crime, unless some point of law shall arise proper to be debated: A rule, which (however it may be palliated under cover of that noble declaration of the law, when rightly understood, that the *judge* shall be *counsel* for the *prisoner*; that is, shall see that the proceedings against him are legal and strictly regular) seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law. For upon what face of reason can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass? Nor indeed is it, strictly speaking, a part of our ancient law: for the *Mirroure* having observed the necessity of counsel in civil suits,—
“ who

“ who know how to forward and defend
“ the cause by the rules of law, and
“ customs of the realm”, immediately
subjoins—“ and more necessary are
“ they for defence upon indictments and
“ appeals of felony than upon other ve-
“ nial causes.” And, to say the truth,
the judges themselves are so sensible of
this defect in our modern practice, that
they seldom scruple to allow * a prisoner
counsel, to stand by him at the bar, and
instruct him what questions to ask, or
even to ask questions for him, with re-
spect to matters of *fact*; for as to mat-
ters of *law*, arising on the trial, they are
intituled to the assistance of counsel.

The prisoner being thus assisted by
the aid of counsel, (as we can safely say
he may be, under the sanction of such
high authority) and the examination of
his witnesses being at an end, the Judge

* Blackstone.

Advocate is allowed to reply * to his defence ; not, however, upon any *new* subject matter that shall appear, but strictly to that which shall relate to the original charge ;—and in like manner as the Judge Advocate, the prisoner may be indulged in answering him in rejoinder. For the law of England industriously endeavours to investigate truth, at any rate. It varies its examination of facts, according to the nature of the facts themselves : This being the one invariable principle pursued, that as well the best method of trial, as the best evidence upon that trial, which the nature of the case affords, and no other, shall be admitted in courts of justice. The prisoner is likewise permitted to adduce the testimony of persons of reputation, in support of his character and the integrity of his life ; for if for mutiny, desertion, or any other crime, there shall be nothing but pre-

* Lord George Sackville's Trial.

sumptive proof adduced, the evidence of his former good conduct, will indisputably serve to influence a decision in his favour.

In transgressions punishable by Martial Law, the evidence, in general, is so positive and clear, that it seldom or never happens, that a criminal is convicted without more than a sufficiency of legal proof. One * witness, however, (if credible, and none other are to be had) is evidence enough to a jury of any single fact; though undoubtedly, the concurrence of two, or more, would strengthen and corroborate the proof. Presumptive † evidence even hath been deemed sufficient for condemnation, although the prisoner hath absolutely denied the fact. This must certainly be admitted in many cases; as, for instance, in that of mur-

* Blackstone,

† Ibid.

der,

der, when the deed is usually perpetrated in secret, and when, consequently, no witness can be produced; but then it is a proof that should be warily allowed: guilt may, undoubtedly, be brought to punishment by it, but innocence may as often be its victim.

The law, careful of the rights, and watchful over the safety of individuals, hath wisely ordained, that prisoners shall be admonished not to criminate themselves, by an acknowledgment of their guilt. The power of coercion it would have exerted only on the clearest proof: *Preventive* justice being on every principle of reason, humanity, and sound policy, preferable in all respects to *punishing* justice. The confession, † however, of the fact, before a magistrate, a justice of the peace, or a secretary of state, hath at all times been admitted as evidence

† Hales, P. C. 102, 262, 263, 264.

against

against the defendant, being the party confessing, but not against others*; though it hath been an universal and established custom, in those prosecutions when a man's confession hath been adduced to his own disadvantage†, that the whole, and not particular parts, shall be produced before the court.

In the case of informers, whose veracity should ever be suspected, and whose conduct should carefully be watched, experience shews the necessity of caution in the admission of their evidence. Can the wretch, who from the dread or certainty of punishment, sinks into that basest of all human characters, the betrayer of the secrets of his friend, or who, spurred by the hope of gain, aims, for a few pounds, at the life of his fellow-creature,—can he be trusted in the

* State Trials, Vol. 3. f. 89.

† Hawkins, P. C. 6, 2. c. 46.

testimony

testimony he may advance in the prosecution of his treachery? Mercy tells us, no. The attributes of justice, and of fair benevolence, are decked in robes of kindness and humanity: calmness and deliberation attend them in their course; suspicion is awake, but unerring truth is evermore their guide. And yet the written deposition of an informant, subscribed to, and taken upon oath, before a justice of the peace, upon a commitment for a capital offence, is * admitted as evidence at the trial of that offence; provided, upon oath, and to the satisfaction of the court, it shall appear, that he, (such informant) is † dead, unable to travel, or prevented from appearing through the means or machinations of the prisoner, ‡ and that the deposition which is then offered in examination, is literally the § same with

* State Trials, Vol. 1. f. 265.

† Hales, P. C. 262, 263.

‡ Keeling's Reports, 55.

§ Ibid.

that

that sworn to before the magistrate. But it is not a sufficient reason for authorizing the admission, or the reading of such a deposition, for the prosecutors to say,—*Search hath been made, but the informant is not to be found.* This, even on oath, is not enough: the legal disabilities above-mentioned must be proved, otherwise the information is of no *avail.

The law furthermore declares, that a prisoner may, in exculpation of himself, or in the desire of establishing a conviction of the little reliance to be placed on the deposition of a witness, call † for the evidence which that witness shall have given on oath, before a magistrate; and in the comparison of that with his *viva voce* evidence before the court, if a variation can be found, he may plead that

* Keeling's Reports, 55.

† State Trials, Vol. 2. f. 622 to 627, 644, 647, 657.

variation in support of his own character and justification. And to the same end, should a witness at one trial, vary * from his evidence at another, both trials tending to the same matter of fact, such variation may be advanced as good invalidation of the testimony of the evidence which he shall depose at the second trial. How far hearsay evidence should be admitted, is a subject of such complicated discussion, and involves in its consequences such a variety of reasoning and argument, that it is hard to determine on it. In Martial Law, the promptitude of decision might lead one to suppose, that hearsay evidence might be admitted. But in Martial Law, as in every other code of jurisprudence, however the letter of it may ordain, the spirit of it is certainly repugnant to the admission of proof of such flimsy texture: Nor, indeed is there a necessity for General Courts Martial to adopt an evidence,

* State Trials, Vol. 2. f. 343, 344, 528, 529.

even.

eventually filled with injury and injustice. Equity, in its true and genuine meaning, being the soul and spirit of all law: *positive* law being construed, and *rational* law being made by it. In the one, equity being synonymous to justice; in the other, to the true sense, and sound interpretation of the rule. Positive and direct testimony, as I have already said, is never found wanting at a military trial:—Officers and soldiers are public in their acts;—their crimes are generally notorious, and, therefore, the eyes of the many cannot but be set upon their transgressions. That which a prisoner, however, hath been heard to * say at a time antecedent to his commission of a crime, may be received as evidence by a court, to the end, that it may invalidate or confirm the arguments he may advance in the course of his prosecution and defence.

* State Trials, Vol. 2. f. 254.

In trials for high treason, where the law is not only peculiarly direct, but circumstantial, as to the nature of the proof which is required, previous to the condemnation of a criminal, (and in which, for the same acts that make a man accessary in felony, make him a principal, such being the heinousness of the crime) the similitude of hand-writing hath as frequently been rejected † as admitted as evidence on the part of the Crown. The prevalence of forgery hath been the opprobrium of this, as well as of every other civilized nation, from the earliest period of time. Desperate in his fortunes, or sanguine in his revenge, the villain meditates in secret the despoiling of another of his property or life. Nothing more feasible than the acquisition of stile, or the manner of a man's writing. As a painting, his signature is to be copied; his very ideas, by attention and ability, are to be

† Skinner's Reports.

caught :

caught: in a word, innocence cannot save, nor loyalty protect him, should a familiarity of writing be indiscriminately admitted as a positive confirmation of his guilt. Usage, indeed, establishes that a similitude of hands is no evidence in a criminal case, although it should be capital, unless the papers shall be * found in the possession of the person; then the law accounts it a corroboration of the charge, but otherwise, their authenticity is doubted, and they cannot be received as articles of crimination against the prisoner.

The admission of the evidence of husband and wife against each other, being in law but one person, hath been unusual; though in cases of absolute necessity, it hath sometimes been received †. But an exception to a parent, or to kindred

* Skinner's Reports.

† State Trials. Trial of Lord Audley.

in general, although a good cause of challenge against a juror, is no cause of challenge against * a witness. The law therefore allows a father to be a competent witness for or against his son, or *e converso*; and a master for or against his servant, or *e converso*. In all these instances, however, and in all others which may present themselves at a General Court Martial, the court itself hath the discretionary power of regulating the degree of credit with which each evidence shall be received.

In the former part of this tract, the exceptions which a prisoner is entitled to plead, either peremptorily or otherwise, against jurors, are particularly enumerated; nor is it of less utility to be acquainted with those † which are in common law admitted against witnesses on the trial. The most material are, the

* Hales, P. C. 276, 277.

† Coke upon Littleton, Raymond, Rolle, M. Rep.
parties

parties having been convicted of treason, felony, piracy, premunire, perjury, or forgery ; their being in judgment in attaint for giving a false verdict, or for being in a conspiracy, at the suit of the King ; their being adjudged, for any crime whatever, to stand in the pillory, to be whipped, or to be branded, and this by a court of competent jurisdiction. But these exceptions are only of avail while the decrees continue in full force ; nor are they admissible, unless the records of the decrees shall actually be produced in court *. The law, however, allows, that in all cases, it is sufficient for a witness to be either a gainer or a loser by the issue of the case, whether immediate or consequential, to disqualify his testimony ; and yet, in General Courts Martial, the evidence of inferior officers is admitted against officers of superior rank ; but this is found necessary to subordination : Law could

* State Trials, Vol. 1. f. 268.

not exist, if amongst a set of military men the same exactitude and precision were observed, as is found to be beneficial in the courts of Chancery and King's Bench. In all corps of officers preferment is in view : from the highest to the lowest, a something more advantageous or honourable is always to be expected. When vacancies happen, those vacancies must be filled up ; promotion consequently goes on,—and the whole may be thereby justly considered as interested in the fate and destiny of each other. Officers, therefore, being unrestrained by any legal incapacity of supposed interest-edness in their depositions, are explicitly to speak to facts, but at the same time are to be guardedly restrained from the avowal of any act, which eventually may tend to the crimination of their own reputations.

An infant * may be excepted against, as being of years inadequate to know-

* Hale's, P. C, 263.

ledge;

ledge; but villeins or bondsmen, a class of people indeed no longer known in England, are free to give their testimonies, and their evidence must be admitted †. Accomplices likewise, who have not been indicted for the crime ‡, have been declared unexceptionable witnesses, and it hath been over-ruled, that accomplices who are indicted, are good witnesses for the King until they are convicted §: but when, or upon what occasion, such dread-extorted evidence can in the spirit of equity be received, is a matter that I am ignorant of. Men of science and ability may, in necessity, find a cause for manifold deviations; but judges in a Martial Court of Law, are happily disengaged from an adherence to a rule, which eventually may entail destruction on the unfortunate. Accom-

† State Trials, Vol. 1. f. 253.

‡ Idem, 723.

§ Keeble's Reports.

plices, in every light they may be placed, cannot but be seen in guilt; but if in addition to their first crimes, they afterwards give evidence against those by whom they have been entrusted,—if, in the excess of baseness, after the commission of their transgressions, they exert their faculties to crush their unsuspecting brethren, and screen themselves, how little is their evidence to be credited!—Examine, therefore, with tenfold rigour such witnesses, if they shall appear before you;—search with a probing hand into the recesses of their souls;—doubt and investigate the commonest circumstance they advance;—and as they have already proved themselves detestable amongst men, so look upon their evidence (when truth cannot be discriminated) as the effusion of depravity itself.

In instances of insanity, and while the person hath laboured under the effects of
the

the malady, exceptions have been admitted against him as a witness; although in his lucid intervals, and during the time of his understanding, his testimony hath been received *. This likewise is a matter of weighty consideration, and should be carefully attended to. Few men labouring under the misfortune of periodical or casual loss of senses, can recover themselves so much when their reason returns, as to see things in a clear and undistorted point of view. Moreover, how many are there, who, rational in their appearance, and connected even in conversation, are yet so miserably fallen from what they were, as on some certain points to fly into the utmost extravagance of phrenzy. Such evidence, therefore, should be cautiously received: The law perhaps admits, but humanity most assuredly rejects it.

* Hale's P. C. 278.

By

By the common, as well as by the statute law of England, both judges* and jurors are competent to appear as witnesses at a criminal prosecution; and in like manner, the members of a Court Martial are authorized to give their depositions upon oath. This, though unavoidable in many instances, should be as often guarded against as possible. No man, however upright and determined in his own mind, but may fall into a wrong train of thought, from being by accident acquainted with the merits of a cause, and thereby being prepossessed in some degree as a party. To this end, care should be had in the nomination of the court, to omit, if possible, those officers who eventually may be called upon; and the more especially, as no person would wish to sit in judgment upon another, whose guilt he was convinced

* Blackstone.

of, or whose punishment he saw inevitable.

All witnesses, in a criminal court of law, being obliged to give their evidence with precision, and *viva voce*, no matter prepared in writing is admissible; neither is a witness permitted to read it as his deposition: he may, however, have reference to notes; this leaves the channel open for cross-examination. The evidence of either party may be thereby brought in contradiction, and an important turn be given to a prosecution. Witnesses also are strictly to adhere to matters of fact; evidence signifying that which *demonstrates*, makes clear, or ascertains the truth of the *very fact*, or point in issue, either on the one side or the other, and no evidence *being admissible* to any other point. Opinions, although admitted by some tribunals, are doubtless contradictory to equity, when taken in the abstract, or general point of view.

view. Instead of one, or more, according to their appointment, a prisoner in opinions finds a hundred judges ; each man, however unauthorized, acquits or condemns, according to his own particular sentiments. “ *The truth, the whole truth, and nothing but the truth,*” is thereby radically discarded. *Belief*, which is *repugnant* to their *oath*, is substituted in the room of *certainty*, and the witnesses, unknowingly, are led to commit what may be styled a trespass, if not *a perjury* itself. And in proof of this, it may not be amiss to take notice of what Lord George Sackville advanced at his trial, when the opinion of Colonel Fitzroy was demanded. “ I do not think it,” said he, “ a fair question to ask only a matter of opinion. I do not mean it to prevent the truth coming out ; I mention it merely for the dignity of the court, and for the sake of the method of proceeding in Courts Martial. The witnesses are to lay down facts
“ for

“ for your information, and your judgment is to decide upon them. For the consequence of a court is not to be so let down, as to form their determinations,—their resolutions, upon opinions *.” A contradiction indeed would seem to appear to this, on Colonel Sloper’s being allowed to give an opinion “ as to the condition in which he saw Lord George Sackville,” but then that opinion, as was observed by the Judge Advocate, was *collected* from a *circumstance* which the witness *saw*, and thereby might be termed, in a degree, an *evidence* of the *fact* †.

Although the evidence which is intended more immediately to exculpate a prisoner on his trial, is generally confined to the moment when he is put upon his defence, yet if any thing shall drop

* Lord George Sackville’s Trial, Page 31.

† Lord George Sackville’s Trial, Page 38.

from

from a witness during the course of the prosecution, or while in cross-examination for the Crown, that can in any wise be conducive to the acquittal of the criminal, such matter, however in his favour, shall carefully be admitted, and in the decision on the merits of the cause, it shall without reserve be considered and received as explicit testimony in his behalf.

In the obscurity with which the subject of military jurisdiction hath been surrounded, and in the ignorance in which mankind in general have remained with respect to the extent of its power, it is not to be wondered at that inattention should have been paid to it by those, who not conceiving themselves amenable to its authority, have not acknowledged themselves subject to its decrees. I allude to witnesses subpoenaed, and who, in contempt of court, contumaciously declined giving their attendance, and who

who have otherwise conducted themselves with refractoriness and disrespect. No witness, we will acknowledge, unless his reasonable expences be tendered to him, is bound to appear at all*; nor if he does appear, is he bound to give evidence till such charges are actually paid him; that is, if he does not reside within the bills of mortality, and is summoned to give evidence within them. But this particularly concerns the usage of Courts of Common Law; a Court of Martial Law is different: the jurisdiction of a Court Martial in England being confined to matters merely military, namely, to breaches of the Articles of War, it very rarely happens that the testimony of any civil person is necessary to convict the offender. And in those places abroad (such as Gibraltar) where there is no other law than the Law Martial for English subjects, and where

* Blackstone, Vol. 3. Page 368.

Courts Martial are therefore held for other offences, the case in point may not readily occur, since the English inhabitants are subject to military discipline. The little probability of the evil, may therefore possibly be the reason why no special provision has been made for it by law. But certainly (and it is to be regretted that it is so) no such provision being made, a witness not subject to Military Law, who refuses, on being summoned to attend a Court Martial, or who negligently with-holds his attendance, cannot be imprisoned by the court. to deliver him over to military custody, would be false imprisonment; and, moreover, he would be enlarged on a Habeas Corpus: nor can he be delivered over to the sheriff, or any other civil magistrate; inasmuch as the members composing the court have no authority to issue any warrant which can justify the civil magistrate in detaining him. But upon the general principles and analogies

gies of law (though perhaps there be no analogous determination) a witness summoned to appear before a Court Martial, having necessary evidence to give, and without any reasonable cause withholding his attendance, or contumaciously refusing to attend, may be *indicted* for an offence *against public justice*; because when the legislature gives a court jurisdiction to administer an oath, it necessarily implies a *duty* in the subject to appear to give evidence; and every *neglect* of a public duty is *punishable by indictment*, unless when the act prescribing the duty, points out a *special mode* of punishment. Witnesses, therefore, who may be refractory and contumacious, should never be permitted to escape the severity which the law ordains for those who would screen offenders, and thereby elude the wholesome regulations of their country.

Military, Maritime, and Ecclesiastical Laws spring from the same root ; consequently, they are entitled to the same fostering attention. The Courts of Common Law, as has been already observed, are sometimes obliged to use a parental authority in correcting the excesses of the inferior courts, and keeping them within their legal bounds ; but, on the other hand, they afford them a parental assistance, in repressing the insolence of contumacious delinquents, and rescuing their jurisdiction from that contempt, which for want of sufficient compulsive powers, would otherwise be sure to attend it.

Hitherto we have confined our enquiries to the formation of the court, the method of its proceeding, and the examination of the witnesses, both on behalf of the Crown, and of the prisoner. We now come to the last and most solemn act, the *fixing* of the *crime*, and the pronouncing of the *sentence* of the *law* upon it. Here, indeed,

indeed, deliberation is required. The facts have hitherto appeared before us in order to be arranged, scrutinized, and compared ; but they are now to be decided upon agreeably to the laws of justice and of mercy. At a moment so awful as this, therefore, and when the fate of one in the same rank of being with ourselves is ultimately to be fixed,—when the avenging power of Providence is thus entrusted in our hands, for the benefit of the community at large,—how cautious should we be in our determination !—how attentively should we investigate each open source, each latent principle of action !—Nothing should be forgotten. Coercion, in all its parts, should carefully be weighed ;—the necessity of punishment should calmly be considered ;—but, above all, *mercy* should be embraced as the benigneſt attribute of Heaven. Before we proceed then on this moſt awful of all our duties, let us acquaint ourſelves with the principles of

guilt in general. Let us bear in mind, that the Statute Law of England does very seldom, and the Common Law never, inflict any punishment extending to life or limb, unless upon the highest necessity : and that the Constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the exprefs warrant of law. Let us teach ourselves to discriminate between those who are fit objects for the severity of the law, and those, who from certain causes, are acknowledged to be entitled to its lenity and forgiveness: the final cause of human punishments being, a *precaution* against future offences of the same kind ; and not an *atonement* or *expiation* for the crime committed. Amongst the latter are those who are under a natural * disability of distinguishing *good* from *evil*, as infants under the age of discretion, idiots, and lunatics, none of whom are

* Hawkins' Plea. Cr. B. 1. C. 1. Hales' Plea. Cr. 10. 43, 65.

punishable by any criminal process whatsoever ; neither is a person who has committed a capital crime, if he becomes *non compos* before conviction, to be arraigned, nor if after conviction, to be executed †.

But at the same time that the law is thus tender with respect to criminals who labour under a natural and inevitable deprivation of sense, it is equally as severe against those who by intemperance reduce themselves to a temporary insanity. A man, therefore, guilty of a crime through the effect of voluntary drunkenness, is to be punished for it as if he had been sober †. Also he who incites a madman to commit a crime, is to be considered as a *principal* offender, and is to be punished as if he had perpetrated the deed himself ||. The law declaring, that

† Ibid. Coke's Institutes, C. 4. 6.

† Coke upon Littleton. Hales' Pleas Cr,

|| Ibid.

every

every man in his sound mind, and at the age of discretion, is to know the law, and consequently, that he is punishable by it if he transgresses the boundaries it hath established. Besides *principals*, there are those concerned in some trespasses who are called *accessaries*. An accessary is he who is not the chief actor in the offence, nor present at its performance, but is some way concerned therein, either *before* or *after* the fact committed. As to the point who is accessary *before* the fact, Sir Matthew Hales* defines him to be one, who being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit it. Herein *absence* is necessary to make him an *accessary*; for if such procurer, or the like, be *present*, he is guilty of the crime as *principal*. As to an accessary *after* † the fact, he is a person, who knowing a felony to have been com-

* Hales' Pl. Cr. 615, 616.

† Hawkins' Pl. Cr. 316.

mitted,

mitted, receives, relieves, comforts, or assists the felon : and generally any assistance whatever given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes the *assister* an *accessary*. For if a parent assists his child, or the child his parent,—if the brother receives the brother, the master his servant, or even the husband relieves his wife, who have any of them committed a felony, the receivers become accessaries *ex post facto*. † Accessories, by the general rule of the ancient law, are to suffer the same punishment as the principals : if one be liable to death, the other is also liable. § But why then, says Judge Blackstone, are such elaborate distinctions made between accessaries and principals, if both are to suffer the same punishment ? || For these reasons ;—to distinguish the nature and de-

† Blackstone, Vol. 4. P. 37.

§ 3 Inst. 188.

|| Blackstone, Vol. 4. P. 39.

nomination of crimes, that the accused may know how to defend himself when indicted; the commission of an actual robbery being quite a different accusation from that of harbouring the robber. And because, though by the ancient common law, the rule is as before laid down, that both shall be punished alike, yet now by the statutes relating to the benefit of clergy, a distinction is made between them; accessaries *after* the fact being allowed the benefit of clergy* in all cases, excepting horse-stealing, and stealing of linen from the bleaching-grounds, which is denied to the *principals* and accessaries *before* the fact, in many cases; as, among others, in petit treason, murder, robbery, and wilful burning†. And, perhaps, if a distinction (which certainly may be the case at a Court Martial) were constantly to be made between the punishment of

* Statutes, 3 Eliz. 18 Geo. 2.

† Hales, P. C. 615.

principals

principals and accessaries, even *before* the fact, the latter to be treated with a little less severity than the former, it might prevent the perpetration of many crimes, by increasing the difficulty of finding a person to execute the deed itself, as his danger would be greater than that of his accomplices, by reason of the difference of the punishment †. A man may be indicted as *accessary* and acquitted, and yet be afterwards indicted as a *principal*: § for an acquittal of receiving or counselling a felon, is no acquittal of the felony itself; but it is a matter of some doubt, whether if a man be acquitted as *principal*, he can be afterwards indicted as *accessary before* the fact, since those offences are frequently very nearly allied, and therefore an acquittal of the guilt of one, may be an acquittal of the other also ||. But it is clearly held, that one

† Becaria, chap. 37.

§ Blackstone.

|| Hales' Pl. Cr. 625, 626.

acquitted

acquitted as principal may be indicted as an accessary *after* the fact; since that is always an offence of a different species of guilt, principally tending to evade the public justice, and is subsequent in its commencement to the other*.

These points being thus understood, and the court being cleared, the Judge Advocate reads the proceedings, or sums up the evidence, as may be most agreeable to the court, in each case elucidating such parts as may appear either to himself, or to the different members, worthy of their attention. That done, and all in readiness for judgment, he puts the following question to the respective members, beginning, (as in the trial of a Peer before the House of Lords, which is the highest of all courts of honour) with the youngest:—*From the evidence given for, and against the Prisoner, and from what he has said in his defence, are*

* Blackstone, Vol. 4. P. 40.

you of opinion that he is guilty, or not guilty, of the crime which is exhibited against him?—and as they declare their sentiments, he writes them down severally on a slip of paper. But here it is to be observed, that if in the course of the prosecution it shall appear, the prisoner is innocent of the *capital* offence exhibited against him, he yet is liable to be found guilty in a lesser degree, as must be particularly specified in the verdict. As instead of *murder*,—*homicide* or *manslaughter*, &c. and instead of *desertion*, being *absent without leave*. But in all instances, his acquittal of the capital charge must be inserted; neither can he be convicted upon any extraneous matter. Should the majority, on the casting up of the opinions, be found on the side of mercy, and their votes be *not guilty*, the prisoner is accordingly acquitted; but should they be otherwise, the guilt is declared, and those who have condemned him *

* Adye.

(for

(for it cannot be supposed that those who have acquitted will assign him any punishment) are to pass sentence upon him; always recollecting, that no sentence of death is to be given against an offender by a General Court Martial, unless two-thirds of the members present † shall concur therein; and that no person or persons shall be adjudged to suffer any punishment, extending to life or limb, in *time of peace*, except for such crimes as are expressed to be so punishable by the Articles of War. The Articles of War being in fact the *Lex Scripta*, or Statute Law; as the usages and customs of war may be denominated the *Lex non Scripta*, or Common Law. The manner of passing sentence is thus:—The Judge Advocate beginning with the *junior* of those members who have found the prisoner *guilty*, proceedeth in these words. *Having declared it as your opinion, that the prisoner is guilty of the crime*

† Articles of War.

of ———, *what is the punishment you would have inflicted upon him?*—And as the member adjudges, which may be either to death, corporal punishment, or transportation †, the Judge Advocate writes down the words, and so on, 'till he finisheth with the *senior*. This being done, the Judge Advocate reads aloud the different opinions,—sums up the respective judgments, and then having drawn out the *sentence* agreeably to the sentiments of the court, he is advised by a writer of reputation on the subject of Martial Law §, to preserve the opinions which shall be given, as vouchers, should a revisionary prosecution be commenced in a common court of law. For courts of Common Law, as Sir Matthew Hale lays it down, have superintendency over the King's Ecclesiastical, the King's Military, the King's Maritime,

† Lord George Sackville's Trial, Page 10.

§ *Adye.*

and the King's Academical Laws; to the end, that they may be kept within their jurisdictions, that it may be determined when they exceed them, to restrain and prohibit such excess, and (in case of contumacy) to punish the officer who executes, and in some cases, the judge who enforces, the sentence so declared to be illegal. In the sentence, however, care should be had at all times to omit the word *unanimous*; for though it undoubtedly sounds in favour of a prisoner, should he be acquitted, it certainly violates the obligation of the oath taken by each member at the formation of the court, which particularly enjoins them not to *disclose* the vote or opinion of each other.

How far the author of the essay above-mentioned on General Courts Martial, is right in recommending to the Judge Advocate to preserve a memorandum of the opinions which shall be given in the
course

course of passing sentence on a prisoner, I know not ; I would willingly acquiesce with him in opinion, if in my power ; but I own it appears to me, that if any person is warranted in preserving a record of that kind, it is a member of the court ; for a Judge Advocate not being principally concerned in the judgment which is passed, he cannot possibly be called upon to answer for the consequences which may ensue, whereas a member is liable to prosecution. A Judge Advocate may, it is true, be conceived in the eye of law, the most unexceptionable witness, as not being a party concerned ; but then as he is not subject to any penalty, I cannot see the occasion why he, exclusively, should provide against contingencies. In trials in common therefore, it may not be amiss for a Judge Advocate to trust eventually to his memory. It rarely happens that the proceedings of a Court Martial are brought into litigation in the King's Bench ; but even
when

when they are, a Judge Advocate, as any other witness, can only be made to speak to the best of his knowledge and belief. Evils, moreover, of great magnitude might arise from a practice of this nature. Papers might be mislaid, or death might occasion them to be inspected by those who from wantonness or interest might give them to the public, and thereby disclose the opinions of a court; which, to keep concealed, the Legislature hath been at uncommon and most gracious pains.

Thus being arrived at the conclusion of the proceedings of a trial at a General Court Martial, we shall next come to a few points which it will be necessary to understand, as being immediately connected with the subject. The fair proceedings of the court being examined, and signed by the President and Judge Advocate, (the latter himself always inserting the sentence or sentences) and
sent

sent or delivered to the power by whose authority the court hath been assembled; the court then proceed to the trial of other offenders, or remain *in orders* as a court, waiting the result of the opinion of that power by whom they have been constituted. For Courts Martial being held by the same authority as other courts of law, the person empowered to cause them to be held, possesses the prerogative of *once* returning them their *sentences* for *revision* *, and of *pardon*ing and *remitting* the punishment; but not of altering, or adding to the judgments which shall have been given. It being a fundamental principle of the Common Law of England, of which the Martial is a branch, that a man cannot suffer *more* punishment than the law assigns, but that he may suffer *less*; that the laws cannot be strained by partiality to inflict a penalty beyond what the letter will warrant; but that in cases where

* Articles of War:

the letter induces any apparent hardship, the Crown has the power to pardon. The most amiable prerogative of the Crown, as an able writer has it, is the granting of pardon. Law cannot be framed on principles of compassion to guilt; yet *justice*, by the constitution of England, is bound to be *administered* in *mercy*. This is promised by the King in his coronation oath, and it is that act of his government which is the most personal, and most entirely his own. The King himself condemns no man; that rugged task he leaves to his courts of justice. The great operation of his sceptre is *mercy*. Neither hath he, who orders a Court Martial, the power to cause an offender to be tried a second time for the same trespass, nor after his conviction or acquittal by a court of judicature, to punish him otherwise than by cashiering*.

* Articles of War

However

However clear and explicit a trial at a Court Martial may seem, and however established the offences and offenders may be supposed who come immediately under its jurisdiction, it hath been doubted (for the case hath occurred in the East Indies) whether a General, as commander in chief of an army, not in the field, and consequently not having a warrant empowering him to cause Courts Martial to be held, is liable to be tried by a Court, with a Colonel as its President, as another officer. A Colonel, indisputably may be arraigned before a tribunal with a Major at its head. This point, however, may easily be ascertained upon a due consideration of the principles of Martial Ordination. The principles and axioms of law being general propositions, flowing from abstracted reason, and not accommodated to times or to men; for in law, partiality can have little scope. It is universally and well known, and is the same for all ranks and degrees; it

follows as a regular conclusion, from the premises of fact pre-established. The King is authorized by law to grant his commission for the holding of General Courts Martial, and may delegate that power to officers commanding his armies or garrisons, as we have already observed, (subject, however, to the restrictions contained in the Mutiny Act, which fix the rank and number of the officers who shall compose them). This rank of the president and members of the court not being required by the Act to be varied according to the rank of the offender, it is in his Majesty's breast to vary it at pleasure, so as the rank required by the Act is not violated. But it is the fixed and universal custom of the army, to try officers of a very high rank in a solemn and awful manner, and by a court composed of some officers, at least, if not of all, of the same degree. But, indeed, this question is not applicable to any probable case in the King's, though it is
in

in the East India Company's service, in which the several Governors and Councils are vested with paramount military authority ; for before a man can be tried, he must, in general, be arrested by a superior *, and therefore if a commander in chief of an army abroad commits a military offence, there is no remedy against him, but by an application at home to the Secretary at War, to inform the King, (or the power under whose authority he acts) of his offence ; in which case, if credit be given to the accusation, he must be recalled, in order to be tried and punished. For though the King may, consistently, with law, supersede him, and issue a commission to his successor to empower him to appoint a court for his trial, consisting of those officers who may have served under his command, yet it would be inconsistent with general practice, sound policy, and even, it may be said, with justice.

* Articles of War.

It has likewise been doubted, whether an officer, suspended the service for a specific time, by the sentence of a General Court Martial, or otherwise, be liable to trial during the continuance of such suspension; or whether he can commit a trespass that can be strictly deemed amenable to Martial Law. The question is a nice one, and yet it seems not very difficult to be answered. Suspension is a specific punishment, for a specific crime; but it is a punishment which doth not entirely free a man from his military obligations. On the contrary, he still is considered as in the service; he holds his commission, and at the expiration of the term of suspension, becomes a perfect man again. If therefore during the continuance of this chastisement, he should attempt to go over to the enemy, to desert, or to hold treasonable correspondencies, he certainly is, in such cases, to be dealt with according to Martial Law.

Suspension,

Suspension, which was in the military line probably intended to operate as pecuniary fining was in that of the Common Law, can neither be considered as deprivation nor degradation. It does not divest an officer of his military character, though it puts him under a temporary incapacity to exercise the duties of his station : he still possesses his rank, though he does not reap any immediate advantage from it. It in fact may be looked upon and considered as borrowed from the Ecclesiastical system of jurisprudence, which admitted suspension as a minor excommunication.

One stubborn difficulty, however, seems to present itself from suspension ; and that is the article of pay and allowance. For if an officer shall have been so far punished, as besides being suspended from the exercise of the authority annexed to his rank, to have the pay of his allowance also suspended, he certainly

seems warranted to plead such suspension in bar to the proceedings of a Court Martial; there being always an implied contract between a soldier and his employer, that in consideration of certain pay and advantages granted by the one, the other shall submit to military discipline; and the obligation being mutual, when one fails in the performance of his part, he frees the other from the observance of his: therefore, when the pay and other advantages are suspended by the employer, the subjection to military discipline would seem also suspended. But this difficulty is easily removed, from the circumstance of the officer so suspended, still holding his commission; and from his submitting himself to the punishment which hath been inflicted on his transgression. The latitude of this principle hath even been seen to go farther, and under the sanction of such authority, that (since his Majesty hath been graciously pleased to direct, in cases of doubt,

doubt, members of a Court Martial shall be guided by their consciences, the best of their understandings, and the custom of war in the like cases) it may be said to establish a precedent, which may with safety be appealed to. I mean the trial of Lord George Sackville, who, at the time he was put upon the *judgment* of a General Court Martial, had (so dear is the honour and reputation of a soldier) *neither military employ nor commission* under his Majesty; and yet he was deemed entitled to an awful and solemn investigation of his conduct: application, indeed, having been previously made in his name, and he having declared himself willing to abide by the decision of the Court. In a word then, it may, without risking too much, be asserted, that an officer under suspension, may be considered as *strictly amenable* to Martial Law for any trespass, or transgression he shall commit.

Another

Another matter of equal importance, and hitherto of serious as litigation, hath been the privilege of examining witnesses. Many have confined it to the Judge Advocate, the members of the court, and the prisoner; but others have admitted the accuser to propound questions, as if he alone were the prosecutor. The right, however, of examining witnesses at a Court Martial belongs, in legal strictness, to the Judge Advocate, the members of the court, and the prisoner. To the Judge Advocate, as prosecutor for the Crown*; to each member of the court, for the information of his own conscience; and to the prisoner, for his defence. Yet if an officer, witness to the misbehaviour of another, prefers an ac-

* Pleas or suits being regularly divided into two sorts;—the pleas of the Crown, which comprehend all crimes and misdemeanors wherein the *King* (on behalf of the Public) is the *plaintiff*; and *Common Pleas*, which include all civil actions, depending between subject and subject.

cusation against him, and the King, or his delegates, order a trial solely upon the faith of such accusation, without any other information or presumption of guilt, the Judge Advocate cannot, with decency, refuse the prosecutor's assistance in the conduct of the trial, and the court cannot, in justice, object to it; because in many cases the charge is not to be sustained without an examination guided by a more particular knowledge of the circumstances than the Judge Advocate or court can possibly be acquainted with; and it would indeed be a great obstruction to the public service in military cases, if an officer were deterred from bringing offenders to justice lest, through the ignorance or corruption of a Judge Advocate, a prosecution should miscarry; or if (after having run the risque for the public service) his zeal, by the prisoner's acquittal from the charge, should carry the appearance of malevolence. Upon the whole, the *management*

nagement for the *Crown* belongs in law to the Judge Advocate; at the same time that it appears his *duty* to receive the *instructions*, or at least, to *communicate* with the *accuser*, who is supposed to be the best judge of the evidence necessary to support his own accusation. But it is a very delicate situation for an officer to stand in, and it must be confessed, not an eligible one, where his personal assistance is not absolutely necessary; because it carries with it the air of persecution, rather than of public justice, and pleads strongly for the prisoner in the breast of the court.

Having now explained, with all the brevity in my power, the principles and processes of Martial Law in general, and the duty of a Judge Advocate in particular, I shall here conclude with an observation touching the privilege of that officer, should illegal measures be pursued in opposition to his opinion; and
which

which exonerating him, throws the burthen of the act upon the tenacity of those who may carry it into execution. In such a predicament, (and it is no uncommon one) he should *protest*;—not stop the proceedings of the court,—but enter his objections,—and, with reverence, submit them to the consideration of his Sovereign, or to the delegates of his power.

A FOR-

A
F O R M U L E
 FOR CONDUCTING THE
 P R O C E E D I N G S
 OF A
 GENERAL COURT MARTIAL.

*At a GENERAL COURT MARTIAL held
 in ———, this 1st day of January,
 1784, by virtue of a Warrant from his
 Excellency Lieutenant-General A. B.
 Commander in Chief of his Majesty's
 Forces in ———,*

P R E S E N T,

Colonel C. D. *President.*

Colonel E. F.	Lieut. Col. G. H.
Major J. K.	Captain L. M.
Captain N. O.	Captain P. Q.
Captain R. S.	Captain T. U.
Captain W. X.	Captain Y. Z.
Captain B. D.	Captain O. R.

Captains S. M. and M. K. *Members in
 waiting.*

G. J. *Judge Advocate.*

Lieutenant L. S. called into Court.

The names of the different members being called over to the prisoner, Lieutenant L. S. and the prisoner declaring, upon the question being put, that he has no exceptions to any of the members present,—the President, Members, Members in waiting, and the Judge Advocate are duly sworn.

The *Accusation* read, and entered at full length on the proceedings.

Judge Advocate. How say you, Lieutenant L. S. are you guilty of the crime laid to your charge, or not?

Prisoner. Not guilty.

Ensign H. G. sworn: deposeeth that,
Ec. Ec. Ec.

The Judge Advocate, the members of the court, and the prisoner, if he thinks proper, next proceed to question
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the witness; the questions being carefully inserted, together with the replies, as thus :—

Judge Adv. Did you see the prisoner behave in the manner he is accused of?

Answer. I did.

Judge Adv. Did you actually perceive him give the blow?

Ans. I did.

Colonel C. D. Was there any previous altercation between the parties?

Ans. There was.

Colonel C. D. Was the prisoner insultingly gross and abusive in his language?

Ans. He was.

Judge Adv. What were the epithets he made use of?

Ans.

Ans. He called Captain Z. Y. in the most opprobrious terms, &c. &c.

Prisoner. I would ask the witness if Captain Z. Y. did not make use of the most provoking terms, before I either said or did any thing to him that could be construed offensive?

Ans. I did hear Captain Z. Y. make use of very provoking terms to the prisoner, before the prisoner had either said or done any thing offensively to him.

Prisoner. I wish the court to remember this circumstance,—as I shall bring it in proof when I come upon my defence, that I had no inclination to quarrel with Captain Z. Y. and that whatever subsequently passed between us, was the result of passion, occasioned by injurious and provoking treatment.

The court then *adjourned*, until ten of the clock to-morrow morning.

SECOND DAY'S TRIAL.

Second day of January, 1784.

*At a GENERAL COURT MARTIAL then
held, pursuant to adjournment.*

P R E S E N T.

Colonel C. D. *President.*

Colonel E. F.	Lieut, Col. G. H.
Major J. K.	Captain L. M.
Captain N. O.	Captain P. Q.
Captain R. S.	Captain J. U.
Captain W. X.	Captain Y. Z.
Captain B. D.	Captain O. R.

Captains S. W. and N. K. *Members in
waiting.*

G. J. *Judge Advocate.*

*Lieutenant L. M. sworn: deposes that,
&c. &c. &c.*

Judge Adv. If neither the court or
prisoner have any further questions to
propose, I shall here close the evidence
on the part of the Crown.

The Prisoner put upon his Defence.

Prisoner. As I stand here in a very
trying and awful situation, and as my de-
fence,

fence, whereby I hope to vindicate my character, will necessarily require some preparation, I beg permission to solicit the indulgence of the court for two or three days, that I may have time to collect and arrange the materials I shall have the honour to lay before them.

The court complying with the request of the prisoner, then *adjourned* until ten of the clock of the morning of the 6th instant.

THIRD DAY'S TRIAL.

Sixth day of January, 1784.

At a GENERAL COURT MARTIAL then held, pursuant to adjournment.

P R E S E N T.

Colonel C. D. *President.*

Colonel E. F. Lieut. Col. G. H.

Major J. K. Captain L. M.

Captain N. O. Captain P. Q.

Captain R. S. Captain T. U.

Captain W. X. Captain Y. Z.

Captain B. D. Captain O. R.

Captains S. W. and N. K. *Members in waiting.*

G. J. *Judge Advocate.*

The Prisoner, Lieut. L. S. ordered into Court.

Prisoner. I feel a great and an animating happiness, in this most serious moment of my life, when my honour and reputation are under investigation, that my judges are of that character on which I may rely for every degree of tenderness, delicacy, and justice. I, &c. &c. &c.

The first part of the defence at an end, the prisoner calls in his witnesses, and examines them, in like manner as the Judge Advocate did on the part of the Crown; the Judge Advocate cross-examining where he sees necessary.

Judge Adv. I now shall crave the attention of the court to a few words which I find it expedient to offer in reply to the prisoner's defence. The prisoner has endeavoured to prove, &c. &c.

After

After this, judgment should, in strict propriety, be passed. But as a General Court Martial is a court of equity and honour, as well as of law, they seldom or never, in any period of a trial, shut their ears to a prisoner's vindication of his innocence. The prisoner is consequently indulged in a reply: The Judge Advocate rejoins to him, if he thinks proper.

The court next proceed to judgment.

The court having maturely weighed and considered what hath appeared before them in evidence during the course of the prosecution, as well as what the prisoner, Lieutenant L. S. hath urged in his defence, are of opinion, that he is *guilty* of the *crime* laid to his *charge*, which being a *breach* of the — article of the Articles of War, they do, in consequence, *adjudge* him to be *cashiered*.

(Signed)

Colonel C. D. *President*.

(Signed)

G. J. *Judge Advocate*.

The

The court then *adjourned* until ten of the clock, to-morrow morning.

At a GENERAL COURT MARTIAL held in — this 7th day of January, 1784, pursuant to adjournment.

P R E S E N T.

Colonel C. D. *President.*

Colonel E. F. Lieut. Coll. G. H.

Major J. K. Captain L. M.

Captain N. O. Captain P. Q.

Captain R. S. Captain T. U.

Captain W. X.. Captain Y. Z.

Captain B. D. Captain O. R.

Captains S. W. and N. K. *Members in waiting.*

G. J. *Judge Advocate.*

Captain K. Y. called into Court.

The names of the different members called over to Captain K. Y. and he declaring that he has exceptions to none of the members present,—the President,

sident, Members, Members in waiting, and Judge Advocate, are again duly sworn.

The proceedings then go on as during the first trial. But here it is to be remarked, that whenever members are in waiting, it is right they should regularly sit and be present at all deliberations, even when the court is cleared ; as otherwise, the sudden indisposition of a member, in the last stage of a trial, may, for the information of his substitute, occasion its recommencement. Members in waiting, however, have no voice ; neither can they be permitted to be present when judgment is passing.

It is likewise necessary to mention, that the *adjournment* from day to day, and the meeting in pursuance thereof, should always be noticed on the proceedings. For, as Lord Chief Justice Hale says, if a commission of gaol delivery issues to A. B. &c. they sit one day,

day, and *forget* to *adjourn* their commission, or the clerk forgets to enter the adjournment, if a felony is committed the next day, and they proceed in sessions and take an indictment, and give judgment of death against a malefactor, this judgment is erroneous, and the clerk of assizes shall never be permitted to amend the record, and enter an adjournment; and this judgment being erroneous, shall be reversed: but it makes not the judges guilty of murder or homicide; though, in strictness of law, their *commission* was *determined* by the first day's session *without adjournment*.

F I N I S

